(Attorney Discipline Board) Drafting Notes
Michigan Standards for Imposing Lawyer Sanctions
June 2002

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Preface The preface reflects the Board's proposal that it be allowed to adopt and modify the Standards. The rationale for this is that, given the Supreme Court's decision to rely so heavily on the Board in meting out discipline, the authority to adopt standards for imposing discipline should logically be reposed with the Board in the first instance. Any other approach would be inconsistent with the Michigan system.[1] A principal feature of the Michigan system is that the Court does not necessarily see every discipline case. Of course, the Court has superintending control over the discipline agencies, MCR 9.107(A), and may make any order it deems appropriate in appeals regarding discipline, MCR 9.122(E). Consistent with the Michigan model, the Board proposes that it be allowed to promulgate the Standards. In its opinions, the Board already sets benchmarks for determining the appropriate level of discipline for various offenses. It will continue to do so in its role as an appellate tribunal interpreting and applying the standards. The Board sees, and will continue to see, many more discipline cases than the Court. Accordingly, the Board should be able to update, codify and recalibrate as needed, recognizing that the Supreme Court can always vacate or modify the Board's action, just as it may do in an individual case. New developments not necessarily involving rule changes provide another reason for allowing the Board to update the Standards and commentary.[2]

Definitions The ADB proposes to revise the definition of "potential injury" as follows:

> "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct~~, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct~~. The likelihood and gravity of the potential injury are factors to be considered in deciding the level of discipline.

The ABA definition of "potential injury" seems to place burden on the AGC to show that damage probably would have occurred but for some intervening act. This is inconsistent with Michigan and national precedent. While the degree of damage to the client, complainant or the legal system may be a factor in aggravation, or perhaps mitigation, it is not an element of a professional misconduct claim:

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[1] In our state, the hearing panels issue orders, not recommendations. The prototype is one of a trial court, under an intermediate appellate tribunal, both of which are subordinate to the Michigan Supreme Court. This means quicker, more efficient dispositions. In most states, a panel makes a recommendation either to the court or to another tribunal which then itself makes a recommendation to the high court. This can add months or years to the disposition of a case.

[2] For example, panels and the Board have attempted to address concerns regarding competence, substance abuse, anger management, mental health and other issues through imposition of conditions. As new programs become available or as experiments prove valuable or unworkable, the Board may be able to respond by modifying the standards and commentary to indicate when certain conditions are appropriate in addition to other forms of discipline, and when they are not.

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> Unlike in a civil malpractice suit for damages, a disciplinary proceeding does not require a showing of actual harm. "[A] lawyer may be disciplined even if the misconduct does not cause any damage. The rationale is the need for protection of the public and the integrity of the profession." *Hizey v Carpenter*, 119 Wn 251, 262; 830 P2d 646 (1992) (quoting 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 1.9, at 33 (3d ed 1989)).

In Re Discipline of Halverson, 140 Wn 2d 475, 486; 998 P2d 833 (2000).

Moreover, the ABA definition is somewhat confusing and directs the focus toward whether the injury was probable or whether an intervening event prevented it. In practice, most adjudicators and courts probably do not consult this definition. Even when it is recited, it does not seem to be rigorously applied. Most adjudicators probably require that the injury be reasonably foreseeable. Beyond this, it makes sense that the level of risk (calculated by weighing the likelihood and seriousness of the potential injury) be reflected in the level of discipline. For example, the level of discipline may be lower where both the likelihood of injury and the seriousness of the consequences of the misconduct are minimal than where the likelihood is minimal but the consequences would be grave, or where the likelihood is high and the injury would be substantial. No precise formula or calculus exists, nor is a particular terminology required. However, some verbiage reflecting a continuum may be used to characterize the likelihood (e.g., minimal likelihood, substantial possibility, probable, highly probable) and seriousness (e.g., minor, substantial, serious) of the potential injury.

The definition of "negligence" was revised to make it more readable. No change in substance is intended.

1.3 Among the revisions to this Standard is the clarification that the Michigan Standards apply when a consent discipline is tendered to a panel under MCR 9.115(F)(5).

An informal email listserv survey was conducted, and it was learned that discipline counsel in several states are either required to use standards when discipline by consent is being considered by an adjudicative body or officer, or do so as a matter of practice. Among them are California and Florida, Washington, Arizona, Alaska, Louisiana, and Arkansas. In recent years, over 40% of cases filed with the ADB are disposed of by consent. One could argue that, from the perspective of the public, the bar, and the courts, the goals of consistency, articulation of the basis for discipline, and facilitating review[3] are important in all cases, not merely contested ones. MCR 9.115(F)(5) provides that a panel must approve a proposed consent discipline, and expressly provides for reassignment to another panel for trial if the initial panel rejects the plea. Thus, this is not an empty gesture. Presumably, the panel will be trying to square the

[3] Although the AGC, the respondent, and a hearing panel may agree on misconduct and discipline, a complainant may appeal. See MCR 9.118(A)(1)(granting a complainant the right to petition for review by the ADB) and MCR 9.122(A)(1)(granting a complainant the right to apply for leave to appeal to the Court).

plea with the level of discipline imposed in other, similar cases. The panel will be looking at decisions. Why should it not also look at the Standards? None of this is to say that the AGC and the panel cannot take into account a respondent's remorse and cooperation. However, even if some reduction in discipline is appropriate for a respondent's willingness to stipulate to misconduct, the Standards can provide a useful yardstick for the AGC and panels to begin to gauge the appropriate level of discipline.

In discussions with various persons involved with disciplinary law, the view was expressed that application of the Standards to consent disciplines may make resolution more difficult either because there would be more issues in contention (i.e., which standard is applicable) or because the respondent would be less likely to resolve the matter if too much information would be required in the stipulation. As to the latter point, the Board has concluded that the discipline system functions better and fosters more confidence when the factual bases for decisions are set forth in sufficient detail to enable the reader to understand the nature of the conduct and how a given case differs from other, seemingly similar cases.

As an example, one could compare two consent disciplines submitted to a panel in the last six months, both of which involved forging or altering court documents. The AGC agreed to a suspension of three years in each case. One contains in the stipulation, the following statements:

> 4. The parties also stipulate that ABA Standard 5.11(a) and (b) presumptively apply to his conviction, implicating disbarment as the generally appropriate sanction.
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> 5. The parties further stipulate to the following aggravating factors: ABA Standard 9.22(a), (b), (h), and (k). See, ABA Standards for Imposing Lawyer Sanction, 1991, and its 1992 Amendments.
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> 6. The parties further stipulate to the following mitigating factors: ABA Standard 9.32(c), (e), (i), and (k); specifically regarding mitigating factors 9.32(c) and (i), the parties stipulate that Respondent committed this criminal conduct during a period of time in which he had an untreated drug addiction, that his drug addiction substantially contributed to the criminal conduct, that he presently is in recovery, and that his recovery makes recurrence of the criminal act unlikely. See, ABA Standards for Imposing Lawyer Sanction, 1991, and its 1992 Amendments.
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> 7. It is stipulated between the parties that the presumptive revocation be mitigated to a three (3) year suspension . . . . [Stipulation for Order of Consent Discipline, *GA v Rastello*, 01-105-AI; 01-159-JC (HP Order February, 2002).]

The other is so lacking in specificity in both the formal complaint and the stipulation that it is difficult to even ascertain the nature of the misconduct (which may pose difficulty for a panel evaluating whether to reinstate the attorney). Clear identification of the reasons for the level of discipline (e.g., the mitigating circumstances) can lessen

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the possibility that unexplained decisions become precedent producing presumptive ranges of discipline which spiral ever downward.

2.1-2.7 Changes conforming the Standards to Michigan procedure.

2.1 Commentary to discuss full panoply of responses to misconduct and explain that admonitions and contractual probation, being within the AGC's exclusive authority are not treated in these standards[4].

2.6 ABA Standard 2.6, defining "admonition," has been deleted, as have all standards pertaining to admonitions throughout the document. The arguments in favor of and against including admonitions in these standards are discussed below.

Arguments for inclusion of admonitions. Even though admonitions are technically not discipline in Michigan, this is primarily, if not solely, definitional.[5] For all practical purposes, an admonition serves as a confidential reprimand. Should the admonished attorney subsequently become a respondent in formal proceedings, the admonition is admissible as evidence in aggravation at the sanctions phase of the proceeding, just as a reprimand or any other order of discipline would be. MCR 9.115(J)(3). As the hierarchy implicit in the structure of the ABA Standards indicates, admonitions should ordinarily, if not always, be for conduct less serious than that which would justify a reprimand. Accordingly, it seems logical that the standards applicable to their issuance should be reproduced alongside standards applicable to other sanctions, or consequences for misconduct.

In *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), the Court adopted the ABA Standards on an interim basis, concluding that:

> Their use will further the purposes of attorney discipline, help to identify the appropriate factors for consideration in imposing discipline and establish a framework for selecting a sanction in a particular case, and promote consistency in discipline. Application of the standards will produce reasoned decisions that will also facilitate our review. [426 Mich at 238-239.]

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[4] The commentary to Standard 2.1 and 2.6 may be different if admonition standards are ultimately adopted and jointly published (see note to Standard 2.6).

[5] MCR 9.106(6) provides that:

> *An admonition does not constitute discipline* and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3) [authorizing admonitions to be admitted as evidence in aggravation at the hearing on discipline]. The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint. [Emphasis added.]

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The Court also voiced agreement "with the [following] remarks contained in the preface to the ABA standards":

> For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems. [426 Mich at 246.]

One could argue that all of the foregoing objectives are as important when a lawyer is being admonished as they are when a lawyer is being reprimanded or otherwise disciplined. Merely defining admonitions as something other than discipline does not change the fact that they function essentially as the lowest form of sanction (see foregoing discussion). In fact, admonitions are widely and appropriately used to resolve Requests for Investigation pertaining to low level misconduct. During the year 2001, 125 requests for investigation were disposed of with admonitions, while the total number of discipline orders issued in that year amounted to 123.

Finally, although the Court, in *Lopatin*, seemed focused on the Board and hearing panels,[6] the Court has subsequently indicated that the Standards should be considered by the Attorney Grievance Commission in deciding not to initiate formal proceedings. See, e.g., *Moran v AGC*, 634 NW2d 357 (2001), *Nettles v AGC*, 642 NW2d 680 (2002), and *Turek v AGC*, 621 NW2d 450 (2001) (dissenting opinion of Justice Weaver). Michigan's Supreme Court has taken public protection and perception seriously enough to provide complainants with a right to seek Court review of not only panel and Board decisions, but also the decisions of the Administrator and the AGC.[7] Thus, the question arises whether admonition standards would facilitate review, as well as promote the other objectives set forth in *Lopatin*.

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[6] See, e.g., *Lopatin*, 462 at 238 ("We concluded that written standards are needed to guide the ADB and hearing panels.").

[7] This is analogous to, and consistent with, the recommendations in the Report of the ABA Commission on Evaluation of Disciplinary Enforcement ("McKay Commission Report") that complainants be given the right to appeal the prosecutorial agency's dismissal of a grievance. See Recommendation 8.6, p 43. Although "few of the dismissals appealed and remanded for further investigation ultimately result in a finding of misconduct," the Commission found that a complainant appeal procedure is "more than a mere public relations device." Rather, such a procedure "provides a useful check on the effectiveness of disciplinary counsel's initial screening of complaints and on the quality of investigations." McKay Report, p 45. The McKay Report also adopts a recommendation by the National Organization of Bar Counsel that disciplinary counsel should issue written guidelines for determining which cases will be dismissed for failure to allege misconduct, and that the guidelines be sent to complainants whose cases are dismissed. See Recommendation 8.4 and pertinent comment, pp 43-44.

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	Arguments against inclusion of admonitions in these standards. In Michigan, admonitions are not imposed by the adjudicative arm of the discipline system. Instead, the Attorney Grievance Commission has the sole authority to admonish a respondent. MCR 9.106(6); MCR 9.114(A)(2). Although the AGC may make what it terms "findings," and an admonition may be the functional equivalent of a sanction (see foregoing discussion), the fact that the ADB does not decide admonition cases (and sees such cases only when offered as evidence in aggravation) may hinder the Board's ability to formulate standards in this area. In fact, the Board would be virtually unable to draft commentary which would afford any guidance to the bar in the area of admonitions. Finally, AGC counsel have argued that the Board cannot, absent clear authority of the Court, adopt admonition standards which would be binding on the AGC given that agency's exclusive authority to impose admonitions. **The Board's decision not to propose standards for admonitions.** The ADB has not included the admonition standards in the text of its proposed standards. The Board does not have the experience the Commission has with regard to admonitions. The AGC sees all cases from intake to the stage of dismissal, admonition, formal proceedings or other disposition. It is in a better position to determine what the appropriate standards should be – assuming the Court decides that admonitions should be covered by standards at all. Should the Court adopt admonition standards, direct the AGC to adopt such standards, or direct the Board to adopt them, it would be possible for them to be jointly published (on the ADB website and in hard copy) so that users could find all of the standards in one place.
2.8	Specific sanctions, such as the requirement that a respondent take the Multistate Professional Responsibility Examination (MPRE), or continuing legal education (CLE) courses, have been deleted only because they are not expressly mentioned in subchapter 9.100, *and* they do not exhaust the possible conditions which may be imposed in Michigan. Proposed Standard 2.8(c) tracks the language of MCR 9.106 which gives panels, the ADB, and the Court broad authority to impose "conditions relevant to the established misconduct." Commentary will recite examples of conditions imposed in Michigan to provide guidance and stimulate creative responses to misconduct. Such conditions have, in fact, included requiring a respondent to take the MPRE or CLE courses. Commentary will also reference: that the Grievance Administrator may seek an injunction from Supreme Court under MCR 9.108(E)(4) against an attorney's misconduct when prompt action is required even if no disciplinary proceeding is pending; receiverships (MCR 9.119(G)); interim suspensions under MCR 9.120(B) (felonies) and MCR 9.127(A) (violation of order of discipline tribunal); and, contempt proceedings (MCR 9.127(B)).
2.9	Changes conforming the Standards to Michigan procedure.
2.10	Generalized statements regarding reinstatement deleted.
3.0	This proposed standard substitutes "the Board and hearing panels" for "a court" when discussing the factors to be considered by the decision maker. Of course, the Court may consult and follow the Michigan Standards if it so chooses. However, inasmuch as the

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Board proposes to adopt these standards, it did not seem appropriate for the Board to declare what the Court should do.

Also, proposed Standard 3.0 replaces "the duty violated" with "nature of the misconduct." Thus, the proposed Michigan Standards do not maintain the focus on the duty violated for several reasons.

First, conceptualizing the misconduct in this way does not always lead one to the appropriate standard.[8] The ABA Standards represent an ambitious attempt to provide both a "theoretical framework" which gives courts and adjudicators "the flexibility to select the appropriate sanction in each particular case,"[9] and "recommendations as to the type of sanction that should be imposed"[10] based on the factors defined as relevant in Standard 3.0. The committee which produced the Standards commendably sought to avoid a structure which would yield unhelpful statements such as "the individual circumstances of a case dictate the type of sanction which ought to be imposed." ABA Standards, p 53 n 13. Thus, the committee rejected as "theoretically simplistic and administratively cumbersome" a framework "identifying each and every type of misconduct in which a lawyer could engage, then suggesting either a recommended sanction or a range of recommended sanctions to deal with that particular misconduct." ABA Standards, Methodology, p 3. It is said that "one will look in vain for a section of this report which recommends a specific sanction for, say, improper contact with opposing parties who are represented by counsel (Rule 4.2/DR 7-104(A)(1)) [footnote omitted], or for any other specific misconduct." *Id.* But, despite these disclaimers, the ABA Standards do in fact contain recommended sanctions and do direct adjudicators to certain Standards for certain rule violations – whether one gets there through the direct route of turning to Appendix 1 or the less direct and not wholly reliable route of intuiting which duty has been violated.

The Board has concluded that the ABA Standards are wisely constructed so as to focus adjudicators on relevant factors, to encourage consideration of such factors at appropriate times in the process, to avoid the negative consequences of attempting to spell out a sanction for every conceivable type and combination of misconduct, and to promote consistency while allowing for flexibility. However, the Board believes that it would be worthwhile to help readers find the applicable standard with greater ease. Accordingly, while the general standards (4.0, 5.0, 6.0, 7.0) referring to duties owed to

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[8] Clearly, the avowed aim of the discipline system is to protect individual clients, the public, the courts, and the legal profession from harm caused by the misconduct of errant attorneys. However, deciding which rule violation or type of misconduct embodies which duties seems, at times, a question of definition of terms and may be academic. Many types of misconduct offend against all of the aforementioned persons or institutions. See notes regarding Standard 7.0, *infra,* for some specific examples of plausible alternative categorizations. Although the proposed Michigan Standards retain the references to duties, this serves as an organizational tool rather than an integral part of the process for determining which standard should apply.

[9] ABA Standards, Theoretical Framework, p 6.

[10] ABA Standards, Methodology, p 3.

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various persons or entities have been retained, essentially as useful section headings, the quest to categorize a particular rule violation in terms of the duty violated has not been preserved. Instead, the Board has elevated Appendix 1 (a cross-reference between rules of conduct and applicable standards) to a specific reference in the text of new Standard 3.1 (discussed below).

A second reason for de-emphasizing the duty violated involves the Standards' "assum[ption] that the most important ethical duties are those obligations which a lawyer owes to clients." ABA Standards, Theoretical Framework, p 5. It is not clear that the ABA Standards' prioritization is correct, or that any general declaration that the violation of a duty to one person or entity is always worse than the violation of a duty to another. For example, the Standards might suggest that misappropriation is the most egregious misconduct, and it is certainly among the most serious types of offenses. But, it may not be worse than suborning perjury or corruptly influencing a tribunal.

Third, Michigan and other states have caselaw and rules using different terminology. See, e.g., 9.123(B)(7). See also *In re Reback*, 513 A 2d 226, 231 (DC 1986).

Proposed Standard 3.0(e) clarifies that precedent is a relevant factor. Precedent of the Court and the Board may assist in refining the recommendation and in fashioning proportionate discipline. For example, the Standards' recommendation that suspension is appropriate does not differentiate between the lowest possible term, 30 days, and a suspension of three years or more. Differences in length obviously signal differences in the seriousness of the offense. Also, the consequences of suspensions ranging from 30 to 179 days, from 180 days to three years, and from three years and above, are vastly different. The first allows for automatic reinstatement and the latter two do not. An attorney who does not practice for more than three years as a result of a suspension must be recertified by the Board of Law Examiners. Comparing and contrasting similar cases may also serve to refine sanctions recommendations other than those involving suspensions. The circumstances of a particular case may warrant an increase or decrease in the recommended discipline or imposition of certain conditions.

3.1 A new section, proposed Standard 3.1, spells out the manner in which the standards are to be employed so as to assist the user in applying the standards correctly. The commentary to this standard will contain a statement indicating that, ordinarily it will make sense to proceed in the sequence set forth in Standard 3.1, while recognizing that steps (c) and (d), for example, may merge. In every case, however, the consideration of aggravating and mitigating factors must be considered after steps (a) and (b), if not always last. The commentary may also contain a statement to the effect that one must select the highest applicable recommended sanction as a starting point for the analysis (and give an illustration, e.g., if all of the elements of 4.11 apply, the adjudicator should start with 4.11 not something lower like 4.12). This does not mean that there may be no departure from the recommendation for articulated reasons. See *Lopatin*, 462 Mich at 248 n 13. Indeed, it is almost certainly impossible to prospectively assign the appropriate level of discipline for every permutation of lawyer misconduct which could eventuate. In order to allow for sufficient flexibility to attain the ends of the discipline process in individual cases while providing for an appropriate degree of consistency,

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	the factors enumerated in proposed standard 3.0 and the process set forth in proposed standard 3.1 allow for the user to articulate a basis for concluding that the recommended level of discipline is inappropriate for certain conduct. See proposed Standard 3.1(c).
4.0-8.0	These standards have been placed in a new section entitled "D. RECOMMENDED SANCTIONS." Thus, Standard 3.0 and new Standard 3.1 are the only ones that fall under the section captioned "C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS." As explained above, the factors and the manner of application are set forth in ABA Standard 3.0 (and in proposed Standards 3.0 and 3.1), while both the ABA and the proposed Michigan Standards 4.0 through 8.0 really do more than enumerate factors. They apply the factors and set forth recommended levels of discipline. The proposed Michigan Standards expressly state this. Also, to improve readability, the preliminary language ("Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate"), which is present in every single standard from 4.0 through 8.0, has been deleted from each of those standards and stated once under the caption for section D.
4.1	The references to actual or potential injury in this standard have been deleted. As the cases in the ABA commentary express well, public confidence in lawyers as repositories of funds, and public protection, requires stringent regulation in this area and strict discipline for violation of the rules. The rules are prophylactic and even when harm does not in fact occur (i.e., when client funds have been "put back," for example) serious discipline is warranted. ABA Standard 4.1's references to injury or potential injury may be seen to dilute the recommended discipline where restitution is made. This is a difficult area. On one hand, cases like *In Re Wilson*, 81 NJ 451; 409 A2d 1153 (1979), cogently argue that the ability to make restitution may be the result of fortuitous circumstances, such as the existence of a respondent's wealthy relative. On the other hand, restitution can be evidence of remorse, rehabilitation and a good faith desire to rectify misconduct. Further, if the system provides incentives for restitution, this may foster a greater degree of recompense to injured clients, if not protection from the misconduct in the first instance. As for commingling, again, the focus on injury risks diluting the notion that placing client funds at risk is enough to draw serious discipline. The standard regarding reprimand has been revised to indicate that a respondent should generally be reprimanded only when simple negligence is involved and the injury or potential injury is minor. The injury and potential injury language from the ABA standards was also not used (except in Standard 4.13) because the definition of potential injury seems to place the burden inappropriately on the discipline prosecutor to show that harm to the client probably would have resulted but for some intervening event (see discussion of "definitions" above). That is inconsistent with Michigan law and with the aim of client and public protection. The following hypothetical illustrates the problem with the ABA model: Assume a lawyer takes client funds to cover a cash flow problem; the respondent's likely stream of income in the near future is substantial. Significant hourly work has been billed to several clients and one major contingent case has been settled and the funds will be transferred shortly; the ability to replace the funds is highly probable. The funds are in fact replaced within 30 days after they were "borrowed."

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	At no time could it have been said that harm to the client "would probably have resulted from the lawyer's misconduct" (ABA Standards, Definitions, "Potential injury"). Thus, it could be argued under the ABA Standards that even potential injury is not present in that case. In Michigan (and elsewhere) disbarment would generally still be appropriate, although, depending on the circumstances, a long suspension might be imposed. Under a technical reading of the ABA Standards, reprimand may not even be appropriate in that hypothetical because of the absence of actual or potential injury. Standard 4.13 references injury and potential injury to delimit the instances in which a reprimand is appropriate. The commentary will explain that the deletion of injury from the list of factors in 4.11 and 4.12 does not mean that the injury or the lack thereof is necessarily irrelevant in determining the level of discipline, but that, as it pertains to the misconduct described in these standards, the consideration of injury is generally covered best by Standards 9.22, 9.32, and 9.4.
4.4	The commentary and appendix (cross-reference) will state that violations of Michigan Rule of Professional Conduct 1.1(c) (neglect) are covered by this standard. Model Rule 1.1 does not prohibit neglect. Rather, that former Code of Professional Responsibility prohibition has been encompassed in Model Rule 1.3's requirement that a lawyer shall act with reasonable diligence and promptness in representing a client. ABA Standard 4.4 references neglect as well as lack of diligence.
4.5	Michigan's Rule of Professional Conduct 1.1 melds the first sentence of the model rule together with language from the Michigan and Model Code of Professional Responsibility, DR 6-101(A)(1)-(3). "The result is that MRPC 1.1 contains a clearly-stated affirmative duty to render competent representation in addition to the specific prohibitions contained in the former DR 6-101." *Grievance Administrator v Bruce J. Sage*, No 96-35-GA (ADB 1997). ABA Standard 4.5 seems to focus on the lawyer's assessment of his or her own competence. The proposed Michigan Standard 4.5 instead attempts to more closely track both the Michigan and Model Rule 1.1's language regarding the core duty to provide competent representation. Commentary will explain that the specific duties in Michigan's Rule 1.1(a) and (b) are subsumed by this obligation, and will attempt to provide guidance as to when negligence rises to the level of misconduct.
5.1	Various changes were made to Standard 5.1. First, an attempt was made to fill some of the gaps existing in the ABA Standard. Second, the levels of discipline were slightly recalibrated. ABA Standard 5.13 provides that: "Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." That seemed too low. Third, an attempt was made to clarify that innocent misrepresentations are not covered by this rule. Finally, an express reference to conversion and other mishandling of property entrusted to a lawyer was inserted, thus closing an apparent gap for lawyers who serve as fiduciaries for persons other than their clients. Subparagraph (c) in each of the standards collected under 5.1 tracks the language of similar provisions in Standard 4.1.

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Michigan Rule 8.4 does not precisely track the Model Rule.[11] The differences may be subtle or nonexistent. But, one could argue that Michigan doesn't require dishonesty to affect fitness (i.e., that it is presumed to do so, and that as a matter of grammar the requirement only applies to criminal conduct). One could also point out that the ABA Model Rules support such a reading by putting non-criminal dishonesty, fraud, deceit and misrepresentation in a rule of its own and without a reference to the fitness nexus. However, note the language of Standard 5.13, which speaks of "any other conduct that involves dishonesty, fraud, deceit, or misrepresentation *and* that adversely reflects on the lawyer's fitness to practice law" (emphasis added). This seems to presume that fraudulent conduct must also be shown to reflect adversely on fitness. This seems odd, but it is most likely in the Standards in order to assist in distinguishing from such conduct that "seriously adversely reflects on the lawyer's fitness . . . ." See Standard 5.11(b). Accordingly, the reference has been left in the proposed Michigan Standard 5.1 and has in fact been repeated in a new subsection (see proposed 5.13(b)) to further delineate gradations of misconduct.

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[11] The ABA Model Rule provides:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud , deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Michigan's Rule provides:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
(c) engage in conduct that is prejudicial to the administration of justice;
(d) state or imply an ability to influence improperly a government agency or official; or
(e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

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6.1	"Tribunal" was substituted for "court" throughout the standard to broaden its application and bring it into conformity with MRPC 3.3. Formal changes to 6.13 and 6.14 are intended to clarify that Standard 6.0 applies only to dishonest statements to a tribunal, and that other dishonest statements are covered by Standard 5.1. Text in Standards 6.1-6.4 has been deleted to simplify the language. No substantive change is intended. The definitions of "injury" and "potential injury" are broad enough to include both harm to a party and interference with a legal proceeding. In fact, the section entitled "Theoretical Framework" (ABA Standards, p 4) expressly states that in certain cases "injury is measured by evaluating the level of interference or potential interference with the legal proceeding." Commentary will explain this.
6.2	Commentary to this Standard will, among other things, catalogue the ADB precedent in the areas of failure to respond to a lawful demand for information (MRPC 8.1(a)(2)), failure to answer a request for investigation (MCR 9.104(7); MCR9.113(B)(2)), failure to answer a formal complaint (MCR 9.107), and failure to appear for a hearing.
7.0	Standard 7.0 may benefit from a significant overhaul. It appears to contain some unrelated forms of misconduct which may be more logically grouped elsewhere. For example, it is not clear why unreasonable fees and improper withdrawal do not constitute, primarily, violations of duties owed to clients. Many years ago, when bar associations promulgated minimum fee schedules, perhaps it could be said that this type of misconduct implicated a duty owed to the profession.[12] But, these anti-competitive measures are no longer permitted. Another form of misconduct referenced in Standard 7.0, improper withdrawal, imperils a client's case, disrupts the legal process, and can consume judicial resources thereby requiring the expenditure of tax dollars. Thus, duties to the client, the legal system, and the public are arguably involved. Of these, the duty to the client seems paramount, and might make it more appropriate to place this misconduct under Standard 4.0. (See notes regarding Standard 3.0 for a general critique of the ABA Standards' "duty" approach.). Appropriate categorization may achieve more than intellectual tidiness. It should facilitate the articulation of the appropriate range of discipline depending on the factors set forth in Standard 3.0. In contrast, collecting disparate types of misconduct under one standard may make it difficult to take into account the nature and gravity of the offense. For these reasons, the Board would like to study whether certain misconduct, for example violations of MRPC 1.5 (prohibiting clearly excessive fees, requiring that the basis of the fee be communicated, dealing with contingent fees, and division of fees), should be treated in a different standard, perhaps in the section relating to duties to a client.

[12] On February 4, 1992, the ABA House of Delegates amended Standard 7.0 so that the catch line or topic heading reads "violations of other duties owed as a professional," rather than "violations of duties owed to the profession." Although the Theoretical Framework section of the ABA Standards, p 5, still speaks of duties owed to the profession, this amendment may signal a recognition that categorization of offenses based upon to whom a duty is owed may not always be necessary or useful.

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8.0	This ABA Standard prescribes the generally appropriate level of discipline for two types of misconduct: (1) violation of a discipline order; and (2) misconduct committed by a respondent who might be called a recidivist. The proposed Michigan Standard 8.0 eliminates the latter component and narrows the remainder of the standard to practice in violation of a discipline order. It does not appear that discipline, as imposed in Michigan or most states, follows such a rigid "habitual offender" approach. Read literally, the ABA version would require disbarment of an attorney who had been suspended for 30 days in 1990 for failure to communicate with a client, and was found to have committed similar conduct (by, for example, knowingly failing to return a client's phone calls when a reasonable attorney would have communicated with the client) in 2002. Appropriate weight can be given to prior misconduct through the application of Standard 9.22, and commentary to that standard may indicate that progressive discipline is generally appropriate. Michigan proposed Standard 8.0 also restores the gradations of discipline found in other standards based on a hierarchy of intent (intentional, knowing, and negligent). Knowing violations of discipline orders more often than not result in suspensions under ADB and Michigan Supreme Court precedent. See, e.g., *Grievance Administrator v Che A. Karega*, 123-87; 142-87 (ADB 1988) (citing Supreme Court order in *GA v Morton*, SC No 77136 (1986), "we believe an inference may be drawn that the Court intended that the suspension imposed for a violation of a discipline order should be no less than the suspension which was violated")
9.0 generally	ABA Standard 9.0 itself is simply the caption "Aggravation and Mitigation." However, 9.0 also encapsulates Standards 9.1 (the general statement that such factors may be considered after a finding of misconduct), 9.2 (list of aggravating factors), 9.3 (list of mitigating factors) and 9.4 (list of factors which are neither aggravating nor mitigating). The proposal restyles 9.0 as section E, thus continuing the reorganization of sections with C listing factors, D containing recommendations, and E collecting aggravating and mitigating factors.
9.1	Language may be added to the commentary to reinforce the proper sequence for applying the Standards. Before aggravating and mitigating factors are considered, the appropriate recommended sanction should be determined. See proposed Standard 3.1(b).
9.2 & 9.3	Various changes have been made to the text of these standards. They are generally self-explanatory. Standard 9.32(m) was deleted because, logically, remoteness of prior offenses should not be a mitigating factor. Rather, it should be a consideration in weighing the significance of prior disciplinary offenses, an aggravating factor (Standard 9.22(a)). Also, the commentary will attempt to provide some guidance to panels as to the appropriate application of aggravating and mitigating factors. The ABA Standards have been criticized for not prescribing the appropriate weight to be attached to a given factor in a case or in all cases. One of the most vocal critics in this regard also supplies some of the reasons it may not be possible to assign the appropriate weight to such factors prospectively, without the particulars of the offense, the circumstances surrounding it

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and the offender.[13] It is important to recognize, when assessing the importance of aggravating and mitigating factors, and when applying the standards in general, that mechanistic application of any standard will most probably yield poor results. Thus, a specific aggravating or mitigating factor may be entitled to different weight in different proceedings. For example, as the Board held in *Grievance Administrator v Arnold M. Fink*, No. 96-181-JC (ADB 2001), lv den 465 Mich 1209 (2001), applying Standard 9.32(k):

> *In this particular case*, we consider the criminal penalties imposed upon respondent to be a mitigating factor, for reasons we shall explain.
>
> The Standards do not dictate precisely what weight should be given to aggravating or mitigating factors. Rather, consistent with their intent to permit "creativity and flexibility in assigning sanctions in particular cases," they call for "consideration of the appropriate weight of [all relevant] factors in light of the stated goals of lawyer discipline." Standard 1.3 The purpose of lawyer discipline proceedings is enunciated in Standard 1.1:
>
> > The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.
>
> In our view, penalties associated with conviction do not always mitigate the sanction we would otherwise consider appropriate. For

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[13] See, Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions,* 48 AM. U.L. REV. 1, 30 n 138 (1998):

> As Professor Wolfram has noted, consistency can "freeze a disciplinary system into a level of sanctions that is too lenient or too severe." Wolfram, supra note 93, at 125. Arguments for consistency also assume - possibly incorrectly - "that ways can be found of isolating and quantifying all relevant factors that influence discretion." Id.

Professor Levin also explained:

> Obviously, comparing any two cases is difficult because the underlying facts are never identical and differences in sanctions for seemingly similar misconduct may be due to relevant, even important differences in the facts of each case. [Footnote omitted.] The effectiveness of the ABA Standards in promoting consistency and consideration of relevant individual factors cannot be evaluated by a cursory comparison of case results. Nor do such comparisons indicate how well the Standards promote the goals of discipline. A closer analysis of the framework and the specifics of the Standards as well as their application by the courts is necessary to assess their usefulness.

> example, crimes such as embezzlement or fraud may carry heavy penal sanctions designed to serve the ends of the criminal justice system and yet virtually always also result in lengthy suspensions or disbarment in order to protect the public, the courts and the legal profession. However, where, as here, the conduct warrants condemnation by the profession, but there is no evidence of a character flaw or continuing or underlying problem placing the public at risk, the nature of criminal or other sanctions imposed may be entitled to greater weight. [*Fink, supra,* p 10; emphasis in original.]

Analyzing the mitigating factor of the penalties associated with respondent's assault and battery conviction in light of the circumstances of that particular case, the Board continued:

> We have already mentioned the utter lack of evidence that the shove respondent gave Mr. Miller – an incident which has apparently never occurred during an ordinary case handled by respondent in a career spanning three decades – is symptomatic of some larger problem that needs to be addressed. Moreover, the order of probation entered by the District Court required respondent to participate in counseling as ordered by the probation department. The Administrator has introduced no evidence suggesting that the probation department's evaluation and referrals (if any) did not adequately address any potential issues which might pose a risk to the public, the courts or the profession. [*Fink, supra,* pp 10-11.]

The Michigan Supreme Court has also recognized that certain mitigating factors may not be entitled to much weight in a given case. See, e.g., *Grievance Administrator v Rostash,* 457 Mich 289, 298 (1998) (discounting evidence regarding respondent's character and community contributions an increasing discipline to a 180-day suspension in a case involving violation of the public trust), citing *In Re Grimes*, 414 Mich 483, 497; 326 NW2d 380 (1982) ("[N]either a [respondent's] legal background nor his community accomplishments obliterate our responsibility to impose the discipline his violations warrant."). Accordingly, allowing the discipline tribunals to determine and articulate the appropriate weight to be given to an aggravating or mitigating factor on a case-by-case basis can achieve appropriate results. The Court and the Board can announce general rules in opinions as needed.